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In The

Supreme Court of the United States

October Term, 1984

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,

Petitioners,

v.

KLAMATH INDIAN TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In an 1864 Treaty with the United States, the Klamath Tribe reserved hunting and fishing rights within its Reservation. In a 1901 agreement, the Tribe ceded to the United States 621,824 acres that had been excluded from the 1864 Treaty Reservation boundary by erroneous government survey. The agreement, concluded pursuant to a special act of Congress for the purpose of honoring Klamath Treaty obligations, did not mention hunting and fishing rights but provided that treaty rights "not inconsistent with the provisions of this agreement" would be preserved. Thereafter, virtually all of the lands were closed to entry and placed either in national forests or a national park. The question presented is:

Whether, under these unique circumstances, Congress intended that the 1901 cession agreement implicitly extinguish Klamath Indian Treaty rights to hunt and fish free of state regulation in the ceded area.

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STATEMENT OF THE CASE

By the Treaty of October 4, 1864, 16 Stat. 707, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ceded roughly 20 million acres of aboriginal land to the federal government, retaining a reservation of approximately 1.9 million acres (J.A. 11, Stip. 1 and P.C., App. C). The Treaty confirmed exclusive tribal hunting, fishing, trapping and gathering rights within the Reservation:

> [T]he following . . . shall be set apart as a residence for said Indians [and] held and regarded as an Indian reservation. . . . [T]he exclusive right of taking fish in the streams and lakes, included in the reservation . . . is hereby secured to the Indians.

However, because government surveyors ignored the natural boundaries described in the Treaty where they did not conform to the township subdivision surveys, S. Ex. Doc. No. 62, 53d Cong., 3d Sess. 8 (1895) (Stip., Ex. B),[1] 621,824 acres were excluded from the reservation boundary (J.A. 11-12, Stip. 2 and 3). Following years of tribal complaints, Congress, in an act appropriating money for the "current and contingent expenses of the Indian Department . . . and fulfilling treaty stipulations for the various tribes," directed that a boundary commission be established to determine the amount and value of the land excluded by the incorrect surveys. Act of June 10, 1896, 29 Stat. 321; S. Ex. Doc. No. 129, 53d Cong., 2d Sess. (1894) (Stip., Ex. C).

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[1]The agreed upon facts in this case are set forth in the parties' Stipulated Facts on Cross Motions for Summary Judgment, contained in the Joint Appendix. Exhibits to the Stipulated Facts were not reproduced in the Joint Appendix; they are contained in the plaintiff Tribe's Supplemental Appendix in the Appeals Court Record.

Noting that Congress desired to act "with the greatest equity," S. Doc. No. 93, 54th Cong., 2d Sess. 5 (1897) (Stip., Ex. D), the boundary commissioners interviewed numerous Indians who were signatory to the 1864 Treaty in order to ascertain their understanding of the Treaty. Numerous Indians testified that they were certain the excluded land was intended to be within the Reservation. Because of the land's importance to the Tribe for hunting, fishing and gathering, they had specifically insisted on its inclusion within the Reservation and Commissioner Huntington had acceded to their wishes. Thus, Henry Blow, an Indian who signed the Treaty, testified as follows:

> Q. Was anything said by Mr. Huntington or the Indians about Sycan or Sprague River Valley?
>
> A. Yes; the Indians said they wanted to keep these two valleys for the camas roots and pastures, the fish, etc., as well as the game in the mountains.

Id. at 14 (Stip., Ex. D). Another Treaty signatory, Mo Ghen Kas Kit, explained the treaty negotiations in greater detail:

> At the time of the treaty of Council Grove we, the Indians, told Mr. Huntington, before and after describing these points, that we particularly wanted all the Sycan Valley down to Ish tish e wax, including the Sprague River Valley, because we needed it, especially for the camas and other roots in the valley and the game and the fishing at the Ish tish e wax.
>
> *The main part of the living and subsistence of the Klamaths and Snakes was obtained from these two valleys—such as camas, kooh!, dowex wo-kus, and many other roots and seeds—all of which were largely produced on these places, which, with the fish from the Ish tish e wax, formed the principal part of their living.*

> The Indians particularly told Mr. Huntington of this great need of these two valleys for this purpose, and they were dependent upon them principally for their living. All the headmen and leaders among the Indians saying this—and Mr. Huntington said 'I will—you shall have them in the treaty.' I was a signer of the treaty. I was the head chief of my tribe—the Sprague River Klamaths—and anxious and responsible for their welfare. . . .

Id. at 15, 16 (emphasis added).

In addition to relying on the testimony of the Indians in ascertaining the correct boundary, the Commission placed great weight on the facts that the Klamath Treaty provided no governmental support and the land was poor for agriculture. Therefore, the Commission concluded, the erroneously excluded areas must have been intended as part of the Reservation since they were among the choicest areas for hunting, fishing and gathering.

> It was evidently a principal object of the treaty to draw the Indians in from the large extent of territory over which they were roaming, subject to constant collisions with the steadily encroaching whites, and to concentrate them on an area much more limited, but which would still be ample to provide them with the means of subsistence.
>
> To attain this, the marked tendency of the treaty and the emphatic testimony of the Indians seek to make all the boundaries mountain ridges, a purpose of which the nature of the country renders easy of accomplishment on all sides except the north.
>
> There is no provision in the treaty, however, for the support of the Indians by the Government, and as the high altitude and the severity of the climate are unfavorable to the cultivation of cereals, their subsistence depended upon natural products, consisting primarily of game, fish, wild roots, and seeds. These

> mountain barriers, therefore, must include a territory frequented by game, streams stocked with fish, and ground producing the roots and seeds which formed so large a portion of the subsistence of the Indians. For the two former, the treaty specially provides; the mountain ridges and adjacent valleys furnished the game, the fishery is designated by name, and only the fields (where every season the scattered bands gathered to the harvest of the wo-kus, camus, eppos, and other roots and seeds) were left in doubt; though even this point becomes clear, if a thorough knowledge of the topography of the territory is applied to the treaty.

Klamath Boundary Commission Report, S. Doc. No. 93, *supra* at 6, 7 (Stip., Ex. D).

The Boundary Commission thus determined that the excluded lands had in fact been included within the original Treaty Reservation for the very purpose of meeting the Tribe's subsistence hunting and fishing needs. One of the Tribe's primary subsistence fishing locations recognized by the Boundary Commission was Ish tish e wax Creek which lies within the excluded lands.

> In the spring the "little fisn" (small red suckers) enter this Creek from the river in countless numbers, when the Indians, gathered not only from the reservation but from California, enter the narrow creek at the mouth, unite in line, and drive the fish up to the dam until they form (as eyewitnesses informed us) an almost solid mass. Then the men, women and children scoop them out in great quantities and split and cure them for winter subsistence.
>
> The ground tells its own tale and fully corroborates the Indians; the bottom of the dam shows the rocks water-worn by years with the annual repairs distinctly evident above, the large flat stones forming the floor of the small amphitheater are worn into ruts by countless feet, and deep holes by the fires used for drying for generations. . . .

Klamath Boundary Commission Report, S. Doc. No. 93, *supra* at 10 (Stip., Ex. D). The Boundary Commission concluded its report as follows:

> In conclusion, we respectfully submit that during all this long period of thirty-two years these Indians have exhibited a patient and unwavering confidence in the justice of the Government demanding the highest commendation.
>
> Believing themselves to be grievously wronged by the white settlements on land they considered secured to them by the solemn pledge of the Government *and from which their subsistence was largely drawn*, they yet endured all the aggravating conditions of these years, resisted all the allurements of the adjacent and kindred tribes during the exciting period of the Modoc War, and remained loyal and true.

Id. at 11 (emphasis added); S. Rep. No. 198, 59th Cong., 1st Sess. 5 (1906) (Stip., Ex. F).

Based on its consideration of the needs of the Indians and a thorough examination of the area in light of the description in the Treaty, the Boundary Commission concluded that approximately 617,000 acres had been excluded. As agreed in the stipulated facts, in arriving at the value of the land, the Boundary Commission examined only the character of the land itself, such as soil quality, amount and quantity of meadow and grazing lands, and amount and value of timber on the land (J.A. 12, Stip. 6). It did not take into account the value of hunting, fishing and gathering rights in arriving at its valuation of 86.36 cents per acre.

Following the Boundary Commission's report, Congress authorized the appointment of an inspector for negotiation of an agreement with the Tribe. Act of July 1,

1898, 30 Stat. 571 (J.A. 12, Stip. 7). The Inspector (James McLaughlin) made it plain to the Indians that the Commission had determined that the Reservation in fact included those lands which had been excluded by the erroneous survey and that his negotiations with them were premised upon the Commission's findings:

> I summarized briefly, what had been done in the premises up to our meeting in council and stated that the treaty line as determined by the boundary commission was the one recognized by the Department; that it had been accepted and approved by the proper officials of the government as the line contemplated in the treaty of 1864; that all their right, title and interest to lands outside the boundary commission line was ceded to the Government by their treaty of October 4, 1864, and that the negotiation we were entering upon was based upon the findings of said commission.

H.R. Doc. No. 156, 56th Cong., 2d Sess. 28 (1900) (Stip., Ex. E).

In his report to the Secretary of the Interior, McLaughlin concurred in the Boundary Commission's assessment of the Reservation's unsuitability for agriculture:

> The Klamath Reservation, with an altitude approximating 4,500 feet, is not adapted to agriculture, other than the growing of fodder . . . .
>
> There being frost in this section every month of the year, the cultivation of vegetables and cereals is not remunerative, and in fact not attempted as a paying venture, but there is no finer section in Oregon for stock-growing, and for the Klamaths to continue prosperous and become independent the stock industry should be fostered and encouraged as it is the only remunerative industry in this section of country at the present time.

H.R. Doc. No. 156, *supra* at 30 (Stip., Ex. E); S. Rep. No. 198, 59th Cong., 1st Sess. 11 (1906).

McLaughlin concurred in the Boundary Commission's valuation and thus likewise did not take into account the Tribe's hunting, fishing and gathering rights. H.R. Doc. No. 156, *supra* at 26-28.[2] Following a survey, the total acreage excluded was finally determined to be 621,824 acres. Based on the value determined by the Boundary Commission and the slightly revised acreage figure, McLaughlin negotiated an agreement in 1901 whereby, for money received, the Tribe transferred its title to the excluded lands to the United States. Not one word is said in the agreement about a surrender of hunting, fishing, gathering or trapping rights by the Tribe.

Article I of the 1901 agreement provided that the Indians:

> do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all that part of the Klamath Indian Reservation . . . the tract of land ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

Article II of the agreement provided for compensation of $.86 36/100 per acre:

> In consideration of the land ceded, relinquished, and conveyed by Art. I of this agreement, and in full (sic) of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey . . .

Article IV of the cession agreement provided that:

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[2]McLaughlin's report states: "I further informed them that I had concluded to indorse the price fixed by the boundary commission, and therefore our negotiations only involved the question of what disposition was to be made of the proceeds." H.R. Doc. No. 156, *supra* at 28.

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provisions of this agreement.

The cession agreement was ratified by the Act of June 21, 1906, 34 Stat. 367.

The legislative history of the 1906 Act quotes a report by the Commissioner of Indian Affairs stating "[t]here can be no doubt as to the title of these Indians to their reservation, including the lands excluded by erroneous survey." S. Rep. No. 198, 59th Cong., 1st Sess. 12 (1906) (Stip., Ex. F.). The Senate Report further quotes at length from the opinion of the United States Circuit Court in *C & O Land Co. v. Rankin*, 87 F. 532 (1898), wherein the court held that the United States' authority under the 1864 Treaty to dispose of Klamath Reservation lands is founded in the trust relationship rather than the power of eminent domain.[3]

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[3]Particular attention is called to the language of the proviso in the treaty by which the residence of the Indians therein provided for is to continue until otherwise directed by the President, and the contention is made that this language shows that the rights now held by the Indians are not the same rights originally held by them, but are new rights bottomed on the treaty, and, therefore, subsequent in time to the road grant * * * The treaty could not confer a new right unless it conferred something in addition to what the Indians already possessed. Whatever is within the rights originally held by the Indians has been continuous with them. Equity is not concerned with the form of the proviso in this case. In its purpose and intent it is a reservation in its terms; the right of occupancy was not granted to these Indians. It was withheld by them. Furthermore, I am of the opinion that the words "until otherwise directed by the President" did not have the ef-

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Despite early land pressures from white settlers, of the 621,824 acres erroneously excluded from the survey of the Klamath Reservation, at the time of the negotiation process, only 62,361 acres had been entered. Of this amount, the Oregon Central Military Wagon Road Company had filed upon 31,000 acres and the State of Oregon upon 24,281 acres. Only 7,080 acres, or slightly over one percent, had been taken up by settlers under the homestead, preemption, and timber-culture acts. S. Rep. No. 198, *supra* at 8 (Stip., Ex. F); H.R. Doc. No. 156, *supra* at 10 (Stip., Ex. E). Following the 1901 agreement, virtually all of the ceded lands were immediately closed to entry and placed in either national forests or parks (J.A. 13-14, Stip. 14).

In 1969, the Indian Claims Commission awarded the Tribe $4,152,992.80 as additional compensation for the

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> fect attributed to them by the complainant. The treaty provides that Congress may hereafter permit the sale of these lands if the prosperity of the Indians will be thereby advanced. The relation of the Indians to the United States is shown to be that of dependents. They submit to the control and guardianship of the Government, and this right of sale can only be upon a consideration moving to the Indians. There can be no sale as of a property right in the United States, and the power of sale and the right of the President to direct a removal of the Indians in pursuance of its policy is manifestly the exercise of a trust power by the United States. These powers are not the exercise of proprietary rights by the United States, but the performance of a duty which it has assumed. The President can only direct the removal of these Indians in their interest. The right provided for as to this is not a limitation of the right of occupancy theretofore enjoyed by them, but a provision to make effective the authority to dispose of that right when the United States, acting in their behalf, determines that it is to their advantage that such interest should be sold.
>
> S. Rep. No. 198, *supra* at 12.

ceded lands. The Commission considered only the value of grazing and timber harvesting and did not include tribal hunting and fishing rights in its award of compensation.

The parties have stipulated that the Tribe's hunting, fishing, gathering and trapping rights were crucial to the survival of the Klamath Tribe at the time of the Treaty, at the time of the 1901 agreement, at the time of the 1906 Act which ratified the 1901 agreement, and that they continue to be of great importance to the Klamath Tribe today (J.A.19, Stip. 43). It is further stipulated that Klamath Indians have continued to hunt and fish on the ceded lands from the time of cession to the present without regard for state regulation (J.A. 14, Stip. 20), and that while the State generally asserted jurisdiction over Indian hunting and fishing outside the Reservation boundaries, the parties are unaware of any particular assertion of jurisdiction within the ceded area (J.A. 15, Stip. 22).

In 1954 Congress terminated for most purposes the trust relationship between the United States and the Klamath Tribe. Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564. The Act provided for the sale of the remainder of the Tribe's Treaty Reservation and the distribution of the proceeds among tribal members. Section 14 of the 1954 Act, 25 U.S.C. § 564m, provided that the Act "shall not abrogate any fishing rights or privileges of the Tribe or the members thereof enjoyed under Federal treaty." In 1958 Congress amended the Termination Act to provide for the acquisition of the tribal forest lands by the Secretary of Agriculture and the marshlands by the Secretary of the Interior. 72 Stat. 816, 25 U.S.C. § 564w-1. Pursuant to the Termination Act, as amended, the vast majority of the lands were purchased by the United States and placed in the Winema National Forest.

SUMMARY OF ARGUMENT

Prior to the 1864 Treaty between the Klamath Tribe and the United States, the Tribe had the right to hunt and fish on 22 million acres of aboriginal territory. In the Treaty, the Tribe reserved the right to hunt and fish within a 1.9 million-acre reservation, including those areas excluded from the marked boundary by subsequent erroneous survey. The congressional commission investigating the survey concluded that the excluded lands were in fact included within the Reservation because: 1) the Reservation's purpose was to provide a large enough area to meet the Indians' subsistence needs through hunting, fishing and gathering, as the climate was too severe for agriculture; and 2) the Indians had specifically bargained with the United States' for inclusion of the lands within the Reservation precisely because of their immense hunting, fishing and gathering importance to the Tribe.

Fully aware of these facts, the United States negotiated an agreement for cession of the excluded lands that contained absolutely no mention of these important tribal rights. Article IV of the agreement did, however, contain a general provision preserving those rights under existing treaties that were consistent with the cession. The congressional commission appraised the land only on the basis of its market value and the Tribe was not compensated for the loss of its hunting and fishing rights. At the time of cession, only one percent of the lands had been entered for settlement. Immediately after the cession agreement, and before ratification, virtually all of the lands were withdrawn from entry and placed in national forests or parks.

The legislative history and surrounding circumstances of the cession agreement show plainly that Congress' sole purpose was to benefit the Tribe by honoring the United States' treaty obligations. The 1906 Senate Committee Report quotes a federal court opinion ruling that the government's power under the 1864 Treaty to dispose of Klamath Treaty Reservation lands arises from the trust relationship and not the United States' sovereign power of eminent domain.

Under these circumstances, it is certain that Congress intended only to limit the Tribe's rights to hunt and fish to the degree necessary to accommodate the changed circumstances brought about by placement of the lands into national forests. A total taking away was not necessary nor was it intended. This rationale lies at the heart of this Court's ruling in *United States v. Winans,* 198 U.S. 371 (1905), a leading case also upholding off-reservation fishing rights, and is fully applicable here. Article IV of the cession agreement, preserving consistent treaty rights, confirms this congressional purpose. Thus, while the cession necessarily resulted in the loss of *exclusive* tribal rights to hunt and fish within the ceded area, it did not result in the loss of the compensable right to hunt and fish free of state regulation. Tribal rights have further been accommodated to the changed circumstances by the fact that the Tribe claims no rights appurtenant to the land itself, *i.e.*, the Tribe does not assert the right to enter on private lands over the objection of the landowner.

The cession was not effectuated for the purpose of opening lands to settlement by non-Indians. Rather, the exercise of the rights at issue is compatible with the status of the land. Cases relied on by the State, holding that

tribal rights to hunt and fish are automatically abrogated in areas of diminished reservations that were ceded for the purpose of opening the reservations for non-Indian settlement, are distinguishable based on both the purpose of the cession and the nature of the right asserted.

This Court has held that statutes purportedly affecting treaty hunting and fishing rights should be construed in light of their overall purpose. Here, as in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), Congress' overall purpose was to settle finally an obligation to the Tribe, not to give rise to additional claims for the taking of compensable treaty property rights. A construction of the 1906 Act resulting in a loss of the rights would conflict with Congress' clear purpose of benefiting the Tribe and honoring Treaty obligations. Moreover, because Congress was unquestionably acting in its role as trustee for the Tribe, the confiscatory results urged by the State are precluded. *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980) (Congress may either act as a trustee for the Tribe's benefit or it may act as a sovereign and take tribal property, but it may not act in both capacities simultaneously). And, because Congress is the trustee of tribal property, this Court has held that congressional expressions of intent to abrogate treaty hunting and fishing rights must be clear and unambiguous; "backhanded" or indirect abrogations are not favored. *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968).

The canons of construction consistently applied by this Court to statutes ratifying agreements with Indians require that they not be construed to the Indians' prejudice. Rather, they are to be interpreted liberally in the Indians' favor as the Indians would have understood

in light of the surrounding circumstances. *Antoine v. Washington,* 420 U.S. 194 (1975). Here, the Tribe knew that the boundary commission and the inspector who negotiated the agreement were aware of, and had relied on, the importance of the ceded areas to the Tribe for hunting and fishing.

The Tribe also knew that the appraisal of the land's value was detailed and did not include hunting and fishing rights. Moreover, the value had never been the subject of negotiation with the United States—Inspector McLaughlin simply informed the Tribe that he had accepted the Boundary Commission's value and that their negotiations were limited to the issue of how the Tribe would utilize the proceeds. Finally, they were aware that the agreement contained a provision preserving consistent treaty rights and that virtually all of the land to be ceded was unentered, unenclosed forest that was useful almost exclusively for hunting, fishing and gathering (other than speculative timber production). Under these circumstances, the Klamaths would not have understood the agreement to extinguish their hunting and fishing rights in these important tribal areas.

Congress has been consistently solicitous of the Klamaths' hunting and fishing rights. The 1864 Treaty specifically preserves the rights as does the 1954 Klamath Termination Act. The vast majority of the 1864 Treaty Reservation, both those lands ceded in 1906 and those sold pursuant to the 1954 Termination Act, are now in national forests. Most of the remainder is private commercial forest land on which hunting and fishing is permitted. It would be anomalous to permit the Klamaths to hunt and fish on that portion of their Treaty Reservation sold at

termination but to deny them that right on the smaller ceded portion of the same Treaty Reservation, consisting of similar forest lands, on the strength of an agreement that does not even mention hunting and fishing rights.

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ARGUMENT

A. In Ratifying The 1901 Cession Agreement, Congress Intended To Limit Klamath Indian Treaty Rights Only To The Extent Necessary To Accommodate The Changed Circumstances Brought About By Placement Of The Ceded Lands In National Forests.

The analytical framework for this case was set forth by the Court in *United States v. Winans,* 198 U.S. 371 (1905), which involved tribal hunting and fishing rights on ceded lands. In holding that Yakima Indian treaty rights to hunt and fish survived private acquisition in fee patent of the Indians' usual and accustomed fishing places, this Court stated:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose.

198 U.S. at 381.

Before the Treaty of 1864, the Klamath Indians possessed the unquestioned right to hunt and fish over 22 million acres of territory. Following the Treaty, the purpose of which was to provide a home for the Tribe large enough to permit them to be self-sufficient primarily through hunting, fishing and gathering,[4] the Tribe possessed the *exclusive* right to hunt and fish within the Reservation. The right to hunt and fish free of state regulation was only part of the exclusive rights held by the Tribe before the cession. Like the Yakima Indians in *Winans,* the rights asserted here were part of larger rights "which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381. Indeed, the areas at issue here were initially included within the Reservation's boundaries at the Indians' insistence because of their tremendous importance to the Tribe for hunting and fishing.

Congress was thoroughly apprised of these circumstances in 1906 through the reports of the Klamath Boundary Commission, the inspector who negotiated the agreement and the reports of the Department of the Interior. In the years between the 1901 Agreement and the 1906 Act ratifying it, Congress had closed virtually all of the ceded lands to entry and placed them within national forests in

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[4]In United States v. Adair, 478 F. Supp. 336, 345 (D. Or. 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied,* — U.S. — (1984), the district court held that "the principal purpose of the [1864 Klamath] Treaty was to provide an area so they could continue to be self-sufficient." The district court further found that the Treaty's primary means of promoting tribal self-sufficiency was through protection of tribal hunting, fishing, trapping and gathering rights. Agriculture was found to be a secondary means. The Ninth Circuit concurred, 723 F.2d at 1409-10, see discussion *infra* at 39.

anticipation of ratification of the cession agreement. Moreover, Congress' primary purpose was to benefit the Tribe by honoring a treaty obligation to rectify a survey error.

Thus, while the Indians' treaty rights had to be accommodated to the changed status of the ceded lands, no "taking away" was necessary nor was it intended. This congressional scheme is confirmed by the provisions of Article IV of the cession agreement providing for the preservation of consistent treaty rights.

1. Article IV Of The Cession Agreement Reflects Congressional Intent To Preserve Compatible Treaty Rights.

Article IV of the 1901 Agreement provides:

> It is understood that nothing in this agreement shall be construed to deprive the said Klamath and other Indians of the Klamath Agency of any benefits to which they are entitled under existing treaties, not inconsistent with the provision of this agreement.

The right asserted by the Tribe here is not inconsistent with the property interest conveyed by the Tribe nor is it incompatible with the purposes of the cession.

a. A Right To Hunt And Fish Free Of State Regulation May Exist Apart From An Ownership Or Possessory Interest In The Land.

The Tribe asserts no continuing proprietary interest in the lands within the ceded area, *i.e.,* a right that is appurtenant to the land itself. The Tribe asserts no right within the ceded area to hunt and fish on private lands over the landowner's objection. Thus, because the right is not a servitude on the land, it is consistent with the

Tribe's cession of full right, title and interest in the land itself.[5] Congress has specifically determined that rights of possession and occupancy are not prerequisite to the continued existence of Klamath treaty rights to hunt, fish, gather and trap. In the Klamath Termination Act, Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564, Congress terminated the remaining portion of the Tribe's post-cession Reservation. However, § 14(b) of the Act, 25 U.S.C. § 564m(b), provided that notwithstanding termination of

[5]The common law has long recognized the right to take wild animals and fish on land owned by another, since such creatures were the property of no one. Early lawmakers in this country eschewed the notion that individual landowners hold absolute ownership of fish and game located on their property in favor of the view expressed in Blackstone's *Commentaries* that "by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody . . ." 2 W. Blackstone, *Commentaries on the Laws of England*, at 411 (1st ed. 1766) (footnote omitted). In Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976), the author notes that "[i]n America, the winner of the debate was Blackstone. The American belief in common rights to wildlife was manifested in doctrines that rejected landowner claims of special privilege and allowed free taking even on private lands." *Id.* at 712. In the constitutions of Pennsylvania and Vermont, the hunters' right to enter all unenclosed private land was recognized. Pa. Const. § 43 (1776); Vt. Const. § 39 (1777). Id. at 713 n.77. This general understanding was explained by Justice Holmes in McKee v. Gratz, 260 U.S. 127, 136 (1922).

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot, and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country . . .

This right to hunt on private land is to be distinguished from a *profit a prendre* which is an enforceable right to hunt or fish on the land and would be an interest in land in the common law. Minnesota Valley Gun Club v. Northline Corp., 290 N.W. 222 (Minn. 1940).

the Reservation's status as a federal Indian Reservation and sale of a portion of its lands, "[n]othing in [this Act] shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under federal treaty." *See Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Kimball I); *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (Kimball II): "The Court in *Kimball I* did not base its decision that withdrawn tribal members retained their treaty rights to hunt and fish upon any rights to tribal property. On the contrary, the court expressly recognized that withdrawn members relinquished all interests in tribal property."[6]

This Court has also recognized that treaty rights to hunt and fish may exist apart from an interest in the land itself. In *Antoine v. Washington*, 420 U.S. 194 (1975), the Court upheld Indian rights to hunt and fish free of state regulation on land to which the Tribe had ceded all right, title and interest and which was thereafter opened to settlement by non-Indians. In *Antoine* two Indians were convicted in state court of the offenses of hunting and possession of deer during closed season in violation of state law. The "crimes" occurred on unallotted non-Indian land which had been within the boundaries of the Colville Indian Reservation prior to diminishment. The cession agreement between the United States and the Tribe pro-

[6]With respect to the Klamath Reservation lands sold pursuant to the 1954 Termination Act (the lands at issue in *Kimball I*) the United States Court of Claims had previously found that "[t]he Government took full title, without restriction, and will pay full fair market value as of the taking. . ." Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 690; 436 F.2d 1008, 1018 (Ct. Cl. 1971).

vided that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged." 420 U.S. at 196 (footnote omitted). Noting that there was no issue of any *right* to hunt without the permission of the private landowners, 420 U.S. at 207, n. 11, this Court held that the application of state law to tribal hunting and fishing rights was precluded. Thus, *Antoine* establishes firmly that the treaty right to hunt and fish free from state regulation may exist on lands in which the Indians have no right, title, and interest.

A number of lower courts have likewise recognized that Indian hunting and fishing rights are not necessarily appurtenant to the land. *See Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974) (rejecting state's argument that Tribe retained only proprietary right to hunt and fish off reservation but necessarily surrendered regulatory right, *i.e.,* to hunt and fish free of state regulation); *Lac Courte Oreilles Band v. Voigt,* 700 F.2d 341, 352 (7th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 53 (1983) (treaty hunting and fishing rights on ceded public lands in northern third of Wisconsin "not dependent on either the Indians' title or right to permanently occupy the land in which it was to be exercised."); *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809, 823 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 707 (1984) (treaty rights to hunt and fish free of state regulation on lands taken by United States for dam and reservoir purposes "are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.").

b. Tribal Retention Of Hunting And Fishing Rights Is Compatible With The Purposes Of The Cession And The Status Of The Ceded Lands.

The legislative history and surrounding circumstances of the 1906 Act show a clear congressional purpose to honor the United States' obligations under the 1864 Treaty. While the purpose of the 1906 Act *was* to honor federal treaty obligations and benefit the Indians, one of its purposes *was not,* like the majority of other turn-of-the-century cession agreements, to open the Reservation for entry and settlement by non-Indians. The 1906 Senate Committee Report quotes the Secretary of the Interior's transmittal letter, noting that only 7,080 acres (slightly over one percent) had been taken up by settlers. S. Rep. No. 198, *supra* at 8. Moreover, prior to the time Congress ratified the 1901 Agreement, it had already withdrawn virtually all of the ceded lands from entry and placed them in national forests or Crater Lake National Park (J.A. 13-14, Stip. 14-18).

Retention of treaty rights to hunt, fish, gather and trap on unsettled public forest lands or private forest lands with the landowner's permission is consistent with the Tribe's cession of title and exclusive rights of occupancy. *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (Kimball I) (terminated Klamath Indians retain non-exclusive rights to hunt and fish free of state regulation on former reservation lands now mostly within national forest). *United States v. Adair,* 478 F. Supp. 336, 346, n. 5 (D. Or. 1979), *mod.* 723 F.2d 1394 (9th Cir. 1984), *cert. denied,* — U.S. — (1984) ("Government's current uses of the Marsh and forests

of the [Klamath] Reservation are consistent with the Indians' claims [to sufficient water for game and fish resources] in this action . . ."; *Lower Brule Sioux Tribe v. State of South Dakota,* 711 F.2d 809, 817-18 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 707 (1984) (Government's use of lands for dam and reservoir purposes "not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to permit settlement by non-Indians.").

Indeed, numerous Indian tribes retained rights to hunt and fish even on lands ceded for the purpose of non-Indian settlement as long as those lands remained public lands of the United States, or as long as they remained unsettled.[7] The Supreme Courts of Montana and Idaho have held, as has a federal district court, that such treaty rights preclude state regulation of Indian hunting and fishing on ceded lands now in national forests. *State v. Stasso,* 172 Mont. 242, 563 P.2d 562 (Mont. 1977) (Treaty with Flatheads, 12 Stat. 975); *State v. Tinno,* 94 Idaho 759, 497 P.2d 1386 (Idaho 1977) (Treaty with Eastern Shoshoni, 15 Stat. 673); *State v. Arthur,* 261 P.2d 135 (Idaho 1953),

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[7]*See, e.g.,* Treaty with the Cherokee (1798), 7 Stat. 62; Treaty with the Koskaskia (1803), 7 Stat. 78; Treaty with the Sauk and Foxes (1804), 7 Stat. 84; Treaty with the Piankashaw (1805), 7 Stat. 100; Treaty with the Ottawa (1807), 7 Stat. 105; Treaty with the Chippewa (1808), 7 Stat. 112; Treaty with the Wyandot (1817), 7 Stat. 160; Treaty with the Ottawa (1821), 7 Stat. 218; Treaty with the Miami (1826), 7 Stat. 300; Treaty with the Potowatomi (1832), 7 Stat. 378; Treaty with the Makah (1855), 12 Stat. 939; Treaty with the Walla Walla (1855), 12 Stat. 945; Treaty with the Yakima (1855), 12 Stat. 951; Treaty with the Nez Perce (1855), 12 Stat. 957; Treaty with the Flatheads (1855), 12 Stat. 975; Treaty with the Navajo (1868), 15 Stat. 667; Treaty with the Shoshoni (1868), 15 Stat. 673.

cert. denied 347 U.S. 937 (1954) (Treaty with Nez Perce, 12 Stat. 957); *Confederated Tribes of the Umatilla Indian Reservation v. Maison,* 262 F. Supp. 871 (D. Or. 1966), *aff'd sub nom. Holcomb v. Confederated Tribes,* 382 F.2d 1013 (9th Cir. 1967) (Treaty with the Walla Walla, 12 Stat. 945). These cases demonstrate that Indian hunting and fishing free from State regulation on national forest lands is not a novel proposition.

2. Neither The Eighth Circuit's Ruling In Red Lake Nor This Court's Ruling In Rosebud Sioux Tribe v. Kneip, Is Inconsistent With The Ruling Below.

The state relies on *United States v. Minnesota,* 466 F. Supp. 1382 (D. Minn. 1979); *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota,* 614 F.2d 1161 (8th Cir. 1980); *cert. denied,* 449 U.S. 905 (1980) *(Red Lake)* for the proposition that a cession of Indian title and diminishment of reservation boundaries necessarily results in abrogation of hunting and fishing rights (State's Brief at 24-26). However, *Red Lake* is distinguishable from this case in several important respects. First, *Red Lake* involved cessions of tribal land under general authority granted by the Nelson Act, the purpose of which was "to restore [Indian Reservation land] to the public domain and open it to settlement by whites." 466 F. Supp. at 1387. In contrast, the Klamath cession was accomplished pursuant to a special act of Congress, the purpose of which was to finally settle a boundary dispute and honor treaty obligations. Opening the lands to settlement was

clearly not a purpose of the 1901 Klamath cession; the lands were immediately placed in national forests or parks.

Secondly, the *Red Lake* court made no distinction between the right to hunt and fish free of state regulation (a regulatory right), and the right to enter upon private land to hunt and fish over the landowners' objection (a property right). Indeed, the entire *Red Lake* analysis is premised on the characterization of the right asserted by the Indians as an interest in property, *i.e.*, appurtenant to the land itself: "These rights are mere incidents of Indian title . . ." 466 F. Supp. at 1385.[8] As the Tribe has demonstrated, however, Indian hunting and fishing rights are a hybrid mixture of proprietary and jurisdictional interests and thus a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself. In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit declined to follow its own *Red Lake* decision based upon that very distinction:

> The district court initially concluded that a finding of abrogation was supported by the plain language of the Fort Randall and Big Bend Acts. The court relied on *Red Lake* . . . to state that "[i]t has been held that statutes which remove 'all right, title and interest' of a tribe in certain land operate to extinguish hunting and fishing rights in the land."

[8]In *Red Lake*, the Tribe and the United States likewise made no such distinctions in asserting their claims. They simply argued that the Red Lake Band retained its treaty rights unaffected by the cession and opening of the Reservation for settlement.

> Then citing statutory language in the Fort Randall Act (section 1) referring to the "settlement of all claims, rights and demands" arising from the project's construction, and in the Big Bend Act (section 1(a)) referring to a taking of the Tribe's "entire interest" in the specified land, the court concluded that these provisions alone "may be * * * sufficient indicia of congressional intent to extinguish treaty hunting and fishing rights of the Tribe within the taken area." We cannot agree.
> . . . .)
> . . . [the district court] . . . failed to recognize that the Tribe's treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation. . . .

711 F.2d at 822-23 (citations and footnote omitted, emphasis in original).[9]

There is a substantial difference between asserting a retained property right to hunt and fish over the objec-

[9]The *Lower Brule* court also relied on the fact that the congressional taking acts there had not resulted in a diminishment of the Reservation boundaries as they had in *Red Lake*. Here, of course, the 1901 cession did result in diminishment of the Klamath boundaries. The Eighth Circuit makes it plain, however, that diminishment is the determinative inquiry only in the absence of federal law preserving the rights:

> If either Act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land *absent federal law preserving the Indians' hunting and fishing rights.*

711 F.2d at 815, *citing* Menominee Tribe v. United States, 391 U.S. 404 (1968) (emphasis added). Here, because the Reservation was not opened for settlement, Article IV preserves the Tribe's rights as does the rule of *Menominee Tribe, supra*, that Treaty rights will not be abrogated by implication.

tion of the landowner on land which has been opened for settlement, as was the case in *Red Lake,* and asserting a right to hunt and fish free of state regulation on national forest lands or private forest lands with the consent of the landowners, as is the case here. *See Antoine v. Washington, supra,* 420 U.S. at 207, n. 11. The rights asserted by the Tribe here are consistent with the 1901 cession and are therefore preserved by Article IV of the agreement.

The State argues, however, that this Court's decision in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), indicates that Article IV has no application in this case (Br. 33-34). Each cession agreement in *Rosebud,* like the Klamath cession agreement, contained a provision preserving any treaty right not inconsistent with the provisions of the agreement. In *Rosebud,* the Tribe had argued that the treaty right to the reservation boundary as described in the Treaty was consistent with the purpose of the cession and therefore was preserved by Article V, the provision similar to Article IV of the Klamath cession agreement. The Indians' argument in *Rosebud* was rejected and because this Court's opinion did not mention Article V, the State concludes therefrom that Article IV has no real significance in this case.

However, the *Rosebud* Court found that one of the very purposes of the Rosebud cession agreement was to diminish the Reservation boundary. Thus, by that fact alone, Article V could not work to preserve the Rosebud Indians' right to the Treaty-described reservation boundary. In this case, the pre-existing treaty right claimed to be preserved by Article IV is not a *sine qua non* of the

cession agreement.[10] The Klamath Tribe concedes that its Reservation was diminished by the 1906 Act. Thus, the question here is, assuming diminishment, whether the survival of tribal rights to hunt and fish is consistent with this cession.

Rosebud establishes that the question of diminishment is separate from the question of whether, notwithstanding diminishment, any beneficial interest has been retained by the Indians. Citing the lower court's ruling in *Rosebud,* this Court made clear that "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries." 430 U.S. at 601, n. 24 citing *Rosebud,* 521 F.2d 87, 102 (9th Cir. 1975).[11]

Rosebud refutes the State's argument that the cession of all right, title, and interest to the land is necessarily inconsistent with a right to be free from state regulation

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[10]Only after the purpose of the cession has been determined can Article IV have any meaning. Thus, Article IV does not aid in determining the central purpose of the cession, but once that purpose is determined, it does operate to preserve rights consistent with that purpose.

[11]*Rosebud* also relied on Ash Sheep Co. v. United States, 252 U.S. 159 (1920), where it was held that notwithstanding that the Indians had relinquished their possesory right to a portion of their reservation, any benefits which might be derived from the use of the land belonged to the beneficiaries and not the trustee until the lands were actually sold. Therefore, the lands were not public lands for purposes of sheep grazing. The cession agreement in *Ash Sheep* was in all material respects similar to that in *Rosebud.*

while hunting and fishing on the land.[12] The retention of such hunting and fishing rights does not detract at all from the property interest conveyed, *i.e.*, all right, title and interest to the land. Article IV therefore preserves those rights.

B. The 1906 Act Should Be Construed Consistently With Its Overall Purpose Of Honoring Treaty Rights And Finally Settling A Boundary Dispute.

The legislative history and surrounding circumstances of the 1906 Act establish that the overall congressional purpose was to benefit the Indians by honoring the United States' treaty obligations.[13] In *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), this Court looked to the overall purpose of the 1954 Menominee Termination Act

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[12]State v. Hero, 282 N.W.2d 70 (S.D. 1979), upon which the States relies, is inapplicable here. While *Hero* involved the question of whether the State could regulate Indian hunting and fishing within the diminished Rosebud Reservation, the purpose of the cession agreement at issue there was to open the land to non-Indian settlement. The land itself was viewed as being bereft of fish or game. 282 N.W.2d at 71, citing 45 Cong. Rec. 1068 (1910). Moreover, the Indians in *Hero* asserted a continuing proprietary interest on the private land as well as the right to hunt free of state regulation, and the court in *Hero* thus made no distinction between the proprietary and jurisdictional aspects of the right.

[13]This singular beneficent purpose is to be distinguished from the purposes of the congressional acts that opened Indian reservations for non-Indian settlement. *See, e.g., Red Lake, supra,* 466 F. Supp. at 1387: "The legislative history of the 1889 Nelson Act . . . makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites." (Citation omitted).

and held that a construction of the Act resulting in an indirect abrogation of a compensable treaty right to hunt and fish free of state regulation would be inconsistent with the overall congressional purpose of settling the government's financial obligations to the Indians:

> We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.

(footnotes omitted), *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Court will avoid a construction that would deprive property owners of a remedy for the taking of property).

In this case, as in *Menominee*, the overall congressional purpose was to finally settle a boundary dispute by paying the Tribe for what it was giving up. Congress was aware that Treaty hunting and fishing rights were compensable property rights,[14] yet the Government's detailed

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[14]See *Menominee, supra,* 391 U.S. at 413 and n. 15, where the Court notes that in the hearings on the Klamath Termination bill, Senator Watkins expressed the view that perhaps the Government should "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. *See also* United States v. Sioux Nation of Indians, 448 U.S. 371, 423 and n. 33 (1980) (United States' obligation to provide rations for the Sioux was *quid pro quo* for deprivation of hunting rights. " '[T]he Government committed two wrongs; first, it deprived the Sioux of their livelihood [*i.e.*, hunting rights]; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.' " Quoting S. Rep. No. 93-863, p. 2 (1974); Hynes v. Grimes Packing Co., 337 U.S. 86, 105 (1949). *See also* Treaty

(Continued on following page)

appraisal made no mention of them. The Senate Committee's quotation of the federal court opinion to the effect that "this right of sale can only be upon a consideration moving to the Indians. . . ." illustrates the Congressional purpose to pay the Indians for what was being taken and not to create new claims against the Government. S. Rep. No. 198, *supra* at 12.

The 1906 Act should also be construed consistently with the overall purpose of benefiting the Tribe by honoring Treaty obligations. The legislative history shows that Congress sought to further the self-sufficiency purpose of the Reservation by effectuating the cession. S. Rep. No. 198, *supra* at 18. Construing the Act to deprive the Indians of what Congress knew to be their primary source of subsistence would be inconsistent with the purpose of promoting tribal self-sufficiency.

Finally, the legislative history and surrounding circumstances demonstrate conclusively that Congress was acting in its capacity as trustee when it authorized and ratified the 1901 cession agreement. That Congress specifically recognized it was acting in its trustee's role, as opposed to its sovereign's role, is demonstrated by the

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with the Western Shoshoni, 18 Stat. 689 (1863), art. 7 (20-year annunity of $5,000 per year for driving away and destruction of game); Treaty with the Winnebago, 9 Stat. 878 (1846) ($40,000 paid for release of hunting privileges); 13 Stat. 324 (1864) (authorizing President to pay $5,000 to Indians of middle Oregon to relinquish their off-reservation hunting, fishing, gathering and pasturing rights); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) ($15 million for destruction of usual and accustomed off-reservation fishing places); F. Cohen, *Handbook of Federal Indian Law* 468 (1982 ed.).

Senate Committee's reliance on the opinion in *C & O Land Co. v. Rankin:* "These powers are not the exercise of proproprietary rights by the United States, but the performance of a duty which it has assumed." S. Rep. No. 198, *supra,* at 12. A construction of the 1906 Act resulting in abrogation of the rights would be inconsistent with the Act's overall beneficent purpose and Congress' role as trustee. This is particularly true in this instance where the importance of hunting and fishing in the ceded area was acknowledged and relied upon to determine that there had in fact been a mistake in the survey.

This Court has recognized and given effect to the fundamental inconsistency between Congress' role as trustee and its role as sovereign, exercising its power of eminent domain to take Indian property. Thus, the Court has stated that when Congress acts with regard to Indian people, it acts in either one role or the other but may not act in both simultaneously:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians exercising its plenary powers over the Indians and their property, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980) (quoting Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)).

It is certain that the 1901 agreement was undertaken in the United States' capacity as guardian and manager of

the Indians' resources. This precludes the confiscatory construction of the 1906 Act which would result in the loss of a substantial portion of the Indians' primary means of subsistence without so much as a passing mention and without payment of compensation. As this Court reasoned in *Sioux Indian Nation* (quoting Justice Cardozo in *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937)), Congress was wearing its trustee's hat in managing the Klamaths' affairs in 1906 and courts will not imply conduct inconsistent with that trustee's role: "'Spoilation is not management.'" 448 U.S. at 408.

C. The 1906 Act Should Be Construed To Avoid An Indirect Abrogation Of Treaty Property Rights.

Because the United States stands in the role of trustee to the Indians and their property and thus posseses plenary power over tribal property, this Court has repeatedly stated that any congressional attempt to extinguish tribal property rights must be clear and unambiguous. Congress may act to abrogate treaty property rights, but it must do so in a manner that leaves no doubt as to its intent. This Court has steadfastly refused to infer a congressional intent to terminate treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (general application of state law would result in impermissible "backhanded" extinguishment of treaty rights to hunt and fish free of state law); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 690 (1979) ("Absent express statutory language, we have been extremely reluctant to find Congressional abrogation of treaty rights . . ."); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 353 (1941)

("clear and plain" congressional action required to support asserted taking of aboriginal title); *see* F. Cohen, *Handbook of Federal Indian Law* 467-68 (1982 ed.); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Cal. L. Rev. 601 (1975).

In this case, neither the 1906 Act nor its legislative history alludes, however indirectly, to any abrogation of treaty rights to hunt and fish. This result could only be accomplished through an implied extinguishment.[15] The

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[15]The Tribe does not argue here that an abrogation of treaty rights to hunt and fish free of state regulation may only be accomplished by *express* language. Where the language of the statute is not express, however, the intent to abrogate must still, at the very least, be *clear* from the legislative history and surrounding circumstances. Thus, where a reservation is diminished and the ceded lands are opened to non-Indian settlement, it might well be that the totality of circumstances would reveal a clear Congressional intent to abrogate. However, where a reservation is diminished but the ceded lands are not opened for settlement and retain their status as forests in public ownership, diminishment in and of itself does not demonstrate a clear Congressional intent to abrogate. Thus, like the question of diminishment itself, the survival of treaty rights to hunt and fish within the ceded areas of a diminished reservation depends in each case upon an examination of the cessation act, its legislative history and the surrounding circumstances. See Solem v. Bartlett, — U.S. —, 79 L.Fd.2d 443, 451 (1984):

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. . . . In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers. (citations and footnotes omitted).

Court should avoid a construction that would result in a repeal by implication. *Morton v. Mancari,* 417 U.S. 535 (1974). The Tribe has demonstrated that the Treaty right to hunt and fish free of state regulation is consistent with both the technical property interest conveyed and the purposes of the cession. There is no irreconcilable conflict or "manifest incompatibility" between the 1864 Treaty right and the 1906 Cession Act. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468-470 (1982). Under these circumstances, a repeal of the Treaty right may not be implied.

The state argues, however, that diminishment alone is a sufficiently clear indication of congressional intent to abrogate treaty rights. This argument is necessarily premised on the general assumption that the retention of any treaty rights presents an irreconcilable conflict with the diminished status of the ceded lands. However, Congress has diminished Indian reservations for purposes other than settlement by non-Indians. Thus, as this case illustrates, the existence of irreconcilable conflict will depend on the history and circumstances of each diminishment.

For this reason, the authority relied on by the State simply has no application. This case assumes diminishment and presents the question whether, under specific and unique circumstances, a particular treaty-protected *property* right has survived. None of this Court's cases relied on by the State address that issue except *Menominee Tribe, supra.* In that case, this Court held that the total diminishment of the entire Reservation (termination) and the *express* application of state law were not intended to extinguish the compensable property right to hunt and fish free of state regulation. This directly refutes the

State's assertion that this Court must have assumed in *Mattz v. Arnett,* 412 U.S. 481 (1973), that the "treaty right to hunt and fish would have been extinguished if the reservation had been terminated." (Br. 22-23).[16]

D. The 1906 Act Should Not Be Construed To The Indians' Prejudice: Ambiguities Should Be Resolved In Their Favor As They Would Have Understood.

This Court has repeatedly ruled that treaties and agreements with Indian tribes are to be broadly construed

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[16]The State has consistently misunderstood the effects of termination on Indian reservations. For example, at page 21 of its Brief the State argues that where the "Court has not upheld state regulation of an area, it has reached this conclusion because the area had not been removed from reservation boundaries." In its Petition for Certiorari, it mistakenly asserted that, after termination, the lands of the Klamath Reservation remained subject to the Indians' right of occupancy (Petition at 9) and that the lands of the Menominee Reservation remained within reservation boundaries (Petition at 11).

In fact, however, just the opposite is true. The impact of the Termination Acts on the status of the Menominee and Klamath Reservations was much more comprehensive than the impact of the 1901 cession at issue here or other cession agreements construed in the "diminishment" cases. *See, e.g.,* DeCoteau v. District County Court, 420 U.S. 425 (1975). While turn-of-the-century cession agreements sometimes diminished reservation boundaries by removing the Indian country status of a portion of a reservation, the termination acts of the 1950's completely eliminated entire Indian reservations and brought to an end most aspects of the federal-tribal relationship. *See generally* F. Cohen, *Handbook of Federal Indian Law* 815-16 (1982 ed.). Such was the case at both Klamath and Menominee: the Indian country status of both reservations was ended. The lands of the Klamath Reservation were sold outright. The lands of the Menominee Reservation were transferred to a private corporation chartered under Wisconsin law. Moreover, each Termination Act contained express language making the laws of the state applicable to the Tribe and its members, 25 U.S.C. §§ 564(q) and 899. In contrast, the 1901 Cession Agreement contained no comparable provision.

in their favor as the Indians would have understood. In *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975), the Court stated the canon of construction applicable here:

> The canon of construction applied over a century and a half by this Court is that the wording of the treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. In *Choate v. Trapp, supra*, also a case involving a ratifying statute, the Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U.S. at 675, 56 L.Ed. 941.

(citations omitted), *see Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 676 (1979); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

The numerous congressional documents that comprise the legislative history of the 1906 Act show that the Indians understood that the lands to be ceded were indeed part of the Reservation to which their Treaty rights extended. S. Rep. No. 198, 59th Cong., 1st Sess. 17 (1906) (Stip., Ex. F). The United States Inspector emphasized to the Indians that these were their lands and that the negotiations were premised on the findings of the Boundary Commission; specific among which was that the lands had in fact been included within the Reservation precisely because of their hunting and fishing value to the Tribe. H.R. Doc. No. 156, *supra* at 28 (Stip., Ex. E).

At the time of the 1901 agreement, therefore, the Tribe was aware of the following: 1) that the excluded

lands were in fact within the Reservation and had been included specifically for their hunting, fishing and gathering value; 2) that both the Boundary Commission and Inspector were aware of and had relied on this; 3) that despite this awareness on the part of the government, the Boundary Commission's computation of the value of the lands (which McLaughlin adopted verbatim) did not include hunting and fishing rights; 4) that the agreement did not say one word about ceding hunting, fishing, trapping and gathering rights; 5) that the agreement included a provision specifically preserving treaty rights not inconsistent with the sale of this land; and 6) that virtually all of the excluded lands were unentered, unenclosed forest lands that were useful for little other than hunting, fishing and gathering (other than speculative value for timber production).

Under these circumstances, the Tribe would reasonably have believed that failure to mention these express Treaty rights could only result in their continuation. The Reservation was unsuitable for agriculture, S. Rep. No. 198, *supra* at 11; S. Doc. No. 93, supra at 6-7, and the Klamath Tribe was heavily dependent upon hunting, fishing and gathering at the time of the agreement (J.A. 19, Stip. 43). Moreover, tribal members continued their hunting and fishing activities on the ceded lands after their cession (J.A. 14, stip. 20). This indicates that the

Tribe understood its rights to be unaffected by the cession agreement.[17]

The fact that the 1901 agreement was reached during an era of allotment and assimilation does not alter the fact that the Indians were and have remained heavily dependent upon hunting and fishing (J.A. 19, Stip. 43); S. Doc. No. 93, *supra* at 11 (Stip., Ex. D). The record in this case establishes that while the government may have sought to foster "industrious pursuits" by the Klamaths, agriculture and grazing had not taken hold at the time of the agreement.[18] Indeed, it appears unlikely that agriculture ever

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[17]In *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 53 (1983), the Seventh Circuit relied upon a similar analysis to overturn the trial court's finding that "[h]ad the parties intended the 1854 treaty to continue to preserve those rights in the lands previously ceded . . . it is reasonable to believe they would have made it explicit in 1854." 700 F.2d at 363. The court held that failure to mention the rights in 1854 suggested that the Tribe believed their right to use the ceded lands to be secure and unaffected:

> Turning first to the Indian understanding of the treaty, the LCO band was heavily dependent on the exercise of their usufructuary activities throughout the ceded region at the time of the treaty negotiations. Even if some Indians contemplated turning to agriculture as a principal means of subsistence, there is no indication such a transition had been implemented to any extent at the time of the treaty. Second, the Indians in fact continued their hunting and fishing activities on the ceded territory long after their reservations were created pursuant to the 1854 treaty.

Id. at 364.

[18]*See, e.g.*, Boundary Commissioner's Report, quoted in State's Brief at 39: "One step further would assure their self-support . . ." *i.e.*, providing a few cows "as a start" for each family; *see also* Boundary Commissioner's Report, quoted *supra* at 3).

did take hold on the Klamath Reservation. In 1958 the Klamath Reservation comprised "861,125 acres consisting of 693,997 acres of commercial and noncommercial forests, 127,938 acres of open range, 23,421 acres of marsh, 14,524 acres of brush, barren or wasteland, and 1,245 acres of farmland." H.R. Rep. No. 2278, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong & Ad. News 3791, 3792.

To the degree that general statements by Indians that they "desire to give up the old customs of their fathers" (State's Brief at 40) are inconsistent with their express statements regarding the importance of hunting and fishing, that ambiguity must be resolved in favor of the Tribe. However, such statements are not necessarily inconsistent. The District Court in *United States v. Adair, supra*, 478 F. Supp. at 345, found the purposes of the Klamath Reservation to be dual, with self-sufficiency through hunting and fishing having primacy over agriculture. The Ninth Circuit affirmed, 723 F.2d at 1409, holding that "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." The *Adair* court further noted that at the time of the Treaty:

> The Government was probably aware that hunting and fishing held the greatest promise for sustaining the Klamath on their Reservation:
>
> > The land of the Modoc and Klamath Lake Indians is a high, cold plain, nearly on a level with the summit of the Sierra Nevada mountains, too frosty to raise cereal or roots with success, and fit only for grass. The country abounds in wild

> game and the lakes and streams in fish. The Indians make good living and raise a great many horses ....
>
> 1864 Report of the Commissioner of Indian Affairs 121.

723 F.2d at 1409, n. 15.

At the time of the cession, the Klamath Boundary Commission and Inspector McLaughlin certainly understood that the Reservation was unsuitable for agriculture and that the Indians depended heavily on hunting and fishing. It would simply be unfair for the United States, as trustee, to now say to the Tribe that what it really meant in 1906 was this: "Sell to us these forest lands upon which you depend heavily for your subsistence so that the United States may reap the income from timber production;[19] and while the lands will remain as forests, you may no longer hunt and fish upon them. We are sorry we forgot to mention that and that we neglected to pay you for the loss of your rights. We also regret that your Reservation is unsuitable for agriculture; but perhaps you can take up farming anyway." Such a construction of the 1906 Act is squarely inconsistent with the high trust duties that this Nation has assumed toward dependent Indian tribes.

CONCLUSION

In every era of this Nation's history this Court has held strong against assertions of implied abrogations of

[19]The United States paid the Tribe $537,007.20 for the ceded lands in 1906. The Indian Claims Commission found this amount to be unconscionable and awarded the Tribe an additional $4,152,992.80 (J.A., Stip. 19).

important Indian rights—especially when treaty hunting and fishing rights have been at issue—and that historic institutional function should govern here. The State's argument for abrogation is simply too fragile: no language in the 1906 Act, or even in its history, suggested an abrogation; the purpose of the Act, to settle a boundary dispute, could be fully accomplished without an abrogation of hunting and fishing rights; Article IV of the 1906 Act expressly preserved tribal rights not inconsistent with the Act; and the Tribe was never compensated for the loss of such rights. This is the kind of situation, like *Winans* and *Menominee Tribe,* where the moral principles infused into the canons of construction should control: Indian treaty rights should not be obliterated unless the opposing party can marshall the fair weight of evidence to prove Congress' clear intention to abrogate. The State's case falls far short of the standards this Court requires.

Accordingly, the decision below should be affirmed.

Respectfully submitted,

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